Central Law Journal.

ST. LOUIS, MO., FEBRUARY 11, 1916.

A WELL BALANCED AMERICAN COURT.

An ideal judge, from the lawyer's standpoint, is a man whose mind is well stored with the principles of jurisprudence and able to apply them to progress in changing times and conditions. It has seemed axiomatic for them that the common law as shown in its precedents is broad and deep enough for the solution, or to point to the solution, of all our problems so far as their claim to inherent justice is concerned. But whether we approve of these precedents or of the system under which they were created, our civilization has been built upon them, and recognition of them as presenting a uniform rule has been demanded.

There is presumption, as a rule, of construction, behind constitutional and statutory enactment and behind acts and contracts and in their evolution in all of these things, which is referable to our common law. To think of growth with no tying clause to what has gone before, is to imagine something in the history of a people that has never taken place. If this should be attempted, no code of laws or rules of conduct could be framed to control every exigency in human affairs. Something must be left to be settled by tacit understanding arising out of the way people have formerly felt and thought and acted.

A competent judge, then, must be he who knows the precedents of former times, on which our people have builded, and he must be possessed of a mind trained to apply them in new circumstances. He must feel that these, being just as principles, will work out just in detail. But for this detail the legally informed mind may have little of original or acquired aptitude. Indeed, its intense absorption in devotion to principles may have unfitted it, to some extent, for initiative in practiced application. It will decide very rightly, if a proposed application is made, but, if it rejects it, it may not be able to suggest a proper substitute. It is intensely receptive, and it is not intended that it should be creative. What it creates it is partial to and objectors would not obtain a fair hearing on the merits of what a judge has worked out for himself.

But this distinction has not been observed so far as the duties we have cast upon the judicial office is concerned. We have created courts, not only to decide questions of intimate justice in given situations, but we have made it their duty, when condemning situations, to supply others that would be lawful, and expedient.

This feature is illustrated in the various things a judge is called upon to do in the mere detail of his office. For example, a trial judge must see to the proper running of his court, which of itself should not be any great matter, where statutes are full and definite on this subject. But there are many things which discretion must provide for and the judge must in discretion lay down rules which aim at practical results.

Suppose an injunction is sought against a corporation alleged to be insolvent and pending litigation a receivership is instituted. The corporation has extensive interests and litigation to a final decree promises to be of long duration. A prime reason for the cause of insolvency is alleged to lie in mismanagement by directors. Does the judge go any further than appoint the receiver and leave him to work out proper administration? If the judge is not a very practical man or versed in affairs in which the corporation is engaged, this might be the best thing to do. But, if he is a practical man and so versed, his hand ought to be a directing hand, and every step taken should be under his eye.

But the administrative feature goes further in our law, than in the preservation of property pending litigation. Some final de-

crees direct how business shall be conducted so as to comply with the law, for disregard of which a business has been adjudged to fall under its ban. This observation is especially applicable to our trust legislation, and no more memorable case may be referred to than that whereby administrative direction was given in the Standard Oil case.

The suit in which the Standard Oil was called to bar sought relief from monopolistic conditions. The relief was awarded. An adjudged monopoly was ordered dissolved. Ever since then it has been greatly debated whether or not the public has been served or the monopoly suffered by the decree. Here was a matter in which administrative ability to enforce the benefit adjudged, or to end permanently the injury declared, was imperatively needed.

It was a judicial act to declare that an unlawful combination existed and that the units of which it was made up must all act independently of each other. But there was more involved than the interests of the parties before the court. The combination could not vanish into thin air, without injury to those who had not had their day in court. There must be a *modus vivendi* which the court in its administrative capacity must provide, and a plan formulated to release property from the entanglement in which it had been involved.

Every one of these trust suits, where proceedings are brought by the government, involve, in a measure, like questions as in the Standard Oil case. The judicial faculty needs to be informed by business experience and assisted by expert knowledge.

But the states have similar problems in their courts. They may reach conclusions purely judicial in their nature. But complicated situations and commercial interrelationship demand wise practical management of a situation judicial conclusions create.

But, even if equity courts proceed along ancient lines, there is something apparently in our civilization that makes it necessary for discretion to be advised from a practical standpoint.

Let us suppose that an express trust or an implied trust or a trust *ex maleficio* is found to exist. Its long standing has drawn in other interests or complications have arisen which make the immediate carrying into effect of a legal conclusion productive of injustice. Administrative discretion is needed to obtain adequate, or as nearly adequate as may be, justice to all parties.

Our bankruptcy statute and our insolvency laws may be pointed to generally as efforts in the way of remedies of a *cy pres* character. These peculiarly need the administrative rather than the judicial faculty.

Finally, we suggest that all of our special quasi-judicial tribunals involve the thought we are discussing and proclaim that legislation recognizes the existence of what we are urging. It seems to us, therefore, that if we are to continue to impose on judges these administrative duties, a bench of two or more should have men not only with special talents as jurisprudents, but also with the practical knowledge of worldly affairs to round out the justice of their conclusions.

NOTES OF IMPORTANT DECISIONS.

CORPORATION—RIGHT TO FIX CAPITAL STOCK AT LESS THAN TRUE VALUE IN ARTICLES OF INCORPORATION.—In Missouri charter fees are graduated according to the amount of capital stock, starting with $50,000 as a minimum and charging so much additional according to each $10,000 in excess thereof. Incorporators listed their assets at cash $1,000 and personal property $90,000 and asked for incorporation with an authorized capital stock of $50,000. Fees were tendered for this amount, but the Secretary refused to grant letters of incorporation. Mandamus was asked to compel him to grant certificate of incorporation and the preliminary writ was quashed on

demurrer by a majority of four to three. State ex rel. v. Roach, 181 S. W. 90.

The theory upon which the prevailing opinion goes is that the measure is one, primarily, at least, for revenue, and the state is interested in the true value of the capitalization being stated at the inception of a corporation's operations.

The court says information required to be given by incorporators "is of two-fold importance; one in the protection of the public, that no corporation may be organized in which property is taken as capital stock unless the value of the same is equal to the proposed capitalization; the other in the interest of the state, in the exercise of its taxing power, that a corporation may not be organized for a less amount than is shown by the sworn statement of its officers and directors to be the cash value of its property proposed to be taken as the capital stock, which would result in the state being deprived of the corporation tax on the excess of value of the property above the proposed capitalization."

If there is any reason for graduating the fee or tax for incorporation, that reason is entitled to protection. If it is because a corporate entity with enlarged capital has a privilege of enhanced value, the state is entitled to charge for the enhancement. If it may be related to its operations so far as there might arise conflict between stockholders and creditors is concerned, the purpose is one for protection, just as in cases where there is overvaluation. And if this tends to prevent confusion as to what may be deemed donation and capital stock so far as excess above authorized capitalization is concerned, the record should be kept clear on this subejct.

It is true the state is more particularly interested for the benefit of the public that property used for corporate purposes should not be overvalued, but why in an authorized capital stock of $50,000 in cash paid in, should the corporators be allowed to pay in $100,000 and be allowed to call it the former? They get, by indirection, a privilege of enhanced value to that obtained if they only paid in $50,000.

WILLS—COMPUTATION OF DEGREES OF KINSHIP BY DISCREDITED RULE.—In Wheat v. Hill, 227 Fed. 984, decided by Fifth Circuit Court of Appeals, a clause in a will reading: "I hereby will, bequeath and devise to each of my relatives and kindred by blood of the first and second degree, the sum of five thousand dollars ($5,000) in cash," came up for construction. It was held that to ascertain who were entitled, resort should be had to the canon law of England rather than the civil law, this being, as the court thought, the intent of the testator.

The canon law of England was never a part of the common law of this country, for the reason that, among other things, it provided for primogeniture and estates male tail as preferred to estates female tail. As a pure computation it was never in force even in England. The civil law as a rule of computation was generally adopted in this country and it was based upon blood as well. In Texas, as we gather from statement in the opinion, there is no legal distinction between the half and the whole blood. The court's ruling, however, was in favor of uncles and aunt instead of a sister of the half-blood. It was only by canon computation that the uncles came under the second degree. Why should the court conclude that a discredited way of computation should be taken at all? If it had never been in existence anywhere there would be no way of showing an uncle stood in the second degree. Is it not, as if it had never existed anywhere? What existed in England as common law not applicable to our condition, ought to be the same as if it were non-existent, so far as America is concerned. Is it not better to go upon the theory that a testator knows the law of his own state putting half and whole blood on the same footing?

HOMESTEAD—GRANT OF RIGHT OF WAY WITHOUT JOINDER BY WIFE.—In Eng v. Oken, 155 N. W. 796, decided by Nebraska Supreme Court, it was held that a lease for 99 years of a right of way across a homestead unacknowledged by the wife was void.

There is diversity of opinion on this subject. Cases recognizing validity of such a conveyance considering, that a lease is merely the management of a homestead, while the other view is that public policy exemplified in homestead laws looks to the complete integrity of the interest provided for, unless any conveyance at all affecting the rights of the family observes strict statutory requirements. When it is remembered, that it is so easy to procure a properly acknowledged instrument to affect a homestead, it hardly seems there is any reason to protect those who neglect to protect themselves.

Some cases, notably those from Iowa, which were followed in Texas, hold that a conveyance of a right of way across a homstead does not

"defeat the substantial enjoyment of the homestead as such." But this is speech in a relative way and the rule ought to be firm on the line of principle. In a Mississippi case it was said that "a right of way for a railroad company is from its essential nature an interest in land and to the extent of the land taken is a direct dimination of the homestead." It is not perceptible wherein a grant of the right of way for any other purpose would differ in principle from the grant of railroad right of way.

CONSTITUTIONAL LAW — FEDERAL STATUTE FOR PROTECTION OF MIGRATORY GAME BIRDS.—It has been held by two courts and to the contrary by a third, that federal statute for the protection of migratory game birds was unconstitutional, and Kansas now comes forward in a fourth case and agrees with the two decisions above referred to. State v. McCullagh, 153 Pac. 557.

It is interesting to note the reasoning of this court. It says: "The natural flight of wild fowl from one point to another does not constitute 'commerce,' unless that word be expanded beyond any significance heretofore given it. Whatever other element may be spared from a definition of this term, it has not been heretofore directed or affected by human intelligence. But, if the fact were otherwise, the circumstance that birds of a particular species do not habitually remain throughout the year in the same state could hardly bring them within the control of Congress, on the theory that they were thereby impressed with a national character as the subject of interstate commerce. * * * The habit of migration does not vest in the federal government the title to the animal possessing it. Wild animals are declared to be subject to the control of the state—to belong to the people of the state—and the rule has been repeatedly applied to migratory birds."

But this reasoning does not seem very conclusive. The state may have title to migratory birds, but, as they are *ferae naturae*, a captor acquires property in them, though he may be punished for taking them out of season.

Suppose, however, it was of some aid to commerce that migratory birds be legislated about. Congress would have the right to do the legislating. But independently of this, it was held in considering the White Slave cases, that the government might exercise a police power in regard to the flight of women from one state to another, and why not in regard to the flight of birds? It may be remembered, too, that the Lottery Law was held to be constitutional.

THE NEUTRAL IN THE BRITISH PRIZE COURTS.

The main principles of international law, in their application to the circumstances of the present war, have by this time been settled by the Prize Court; the bigger part of that tribunal's work has been performed, for the British navy has done its work effectually; and the Prize Court will not be asked any more to adjudicate on enemy captures for the simple reason that there are no enemy craft on the high seas to afford subjects of capture. The work of the court in the future will probably be wholly concerned with questions affecting neutrals, who may be endeavoring to trade with the central European powers. We propose, therefore, to state how hitherto the Prize Court has dealt with neutral interests, and to leave readers of this journal to form their own opinions as to the rightness in international law of the judgments given. In our survey we shall include decisions of the Prize Courts set up in the British Dominions and colonies as well as of the Chief Court in London.

By article 40 of the Declaration of London "a vessel carrying contraband may be condemned if the contraband forms more than half the cargo." The *Lorenzo*, the property of the New York and Porto Rico Steamship Company, was condemned in the Court of St. Lucia as lawful prize, notwithstanding that her owners had no knowledge that she was being employed in carrying contraband. The same judicature condemned the *Thor*, a Norwegian vessel, in the following circumstances. Prior to the declaration of war she left an American port ostensibly bound for a South American port with a cargo of coal, but unknown to her owners the charterers changed her course, sending her to coal German warships. While on this mission she was, several weeks after the outbreak of the war, captured by a British cruiser. It was proved that the ar-

rangement for change of destination had been made by order of the ship's supercargo who turned out to be an officer in the German Naval Reserve. Condemnation and sale were ordered for the reason that the ship was guilty of unneutral service in the sense of Article 46 of the Declaration of London, she being "under the orders or control of an agent of an enemy government."

The *Leda*, of which the Deutsch American Petroleum Company, a German concern, were registered owners, was captured after the outbreak of war; and in proceedings for her condemnation taken by the British Crown in the Court of Bermuda, an application was made for her release by the Standard Oil Company who averred that they were the beneficial owners of the *Leda*, inasmuch as they owned the entire capital stock of the registered owners who were merely one of their subsidiary companies formed in Germany to market the petroleum shipped by them to that country. The vessel, however, being under the German flag at the time of capture, the applications of the neutral company was without hesitation refused.

The law of the flag received an interesting application in the case of the *Anastassios Koroneos* decided in the Prize Court at Malta. Enemy goods, not contraband, the property of Turkish merchants, were being carried in a neutral Greek vessel to Malta for consignees there. The ship proceeded to discharge into lighters as customary in that port. Between the ship and the quay the goods were seized as enemy property. The court approved the seizure and pronounced decree of condemnation and sale, holding that when put overside into lighters, the goods were no longer covered by the neutral flag and, as enemy property seized afloat, were confiscable as prize.

Goods, seized as prize, had been consigned on an enemy vessel before the outbreak of war by an enemy seller to a neutral purchaser, who accepted the bill of exchange. The terms of the contract contained the words "no arrival no sale." It was held by the Egyptian Prize Court in the case of the *Derfflinger* that these words constituted a condition inserted for the benefit of the seller, and did not prevent the property passing to the buyer on shipment and acceptance of the bill; the goods therefore being neutral property at the time of seizure, were released. The decision in the case of the *Lutzow* also decided in the Prize Court in Egypt, similarly turned on the question whether or not property in the goods seized had passed. A shipment was made by a German firm to Japan, the terms of the contract being delivery of the documents against the sellers' draft. The sellers drew on the London agency of a German bank for account of the buyers and the draft was marked for acceptance at the bank three days before the outbreak of war. The bank then parted with the documents to the agents of the consignees. Owing to the outbreak of war the acceptance was never completed. The court, in these circumstances, found that the property in the goods had not passed to the consignees, and therefore the goods must be condemned as enemy property.

The *Zamora* and the *Antares* were Swedish and Norwegian vessels, respectively, which had been seized while carrying copper shipped by an American company, and brought into a British port. Subsequently, proceedings in prize were initiated, but before they came before the court for hearing, an *ex parte* application was made by the Crown for release of the copper to the British admiralty for use by them. The court ordered that the value of the copper be paid into court and that thereupon it be delivered to the Crown; for owners of property captured or seized as prize cannot demand by any rule of international law that the property be preserved for them *in specie* until the final de-

cree determines whether it is to be released or condemned.

The doctrine of continuous voyage, whether by sea or overland, became part of the law of nations, both as regards the carriage of absolute and of conditional contraband before the outbreak of the present war. Accordingly in the cases of *The Kim, The Alfred Nobel* and other Norwegian and Swedish vessels which had been seized carrying large cargoes of meat and food from New York to Copenhagen, the Prize Court had laid on it the duty of determining the real as distinguished from the ostensible destination of the goods. The judgment of the President in these cases is an international document of great interest and importance. From it we extract the two cardinal rules evolved, which will, we infer, govern all similar seizures. First, and, on the one hand, captors must prove facts from which a reasonable inference of hostile destination may be drawn, but as regards the ultimate hostile destination of conditional contraband captors need only show a highly probable military or government destination and need not prove the particular enemy port or place of ultimate destination; and then, on the other hand, if after the outbreak of war, neutral shippers consign goods of a contraband nature "to order" without naming a consignee, it is a circumstance of suspicion which a prize court may take into account in considering whether the goods were really intended for a neutral consignee, or whether they had an ultimate hostile destination.

We conclude with drawing attention to the useful general rule laid down in the case of *The Clan Grant,* to the effect that the property of an enemy subject who is domiciled in an enemy country but has a house of trade in a neutral country will be treated as enemy property; and if the property belongs to a partnership then. in the absence of evidence to the contrary, it will be presumed to be divided proportionally between the partners, and the partner with an enemy domicile will be condemned. In the case of corporations, however, there is the important decision of *The Poona* which lays down that goods consigned to a duly incorporated British company, to which the property in them has passed, are not confiscable as prize by reason of the fact that all the directors and shareholders of the company are enemy subjects or domiciled in an enemy country; for in law the company is a separate *persona* distinct from the members composing it.

DONALD MACKAY.

Glasgow, Scotland.

IN ACTIONS UNDER FEDERAL EMPLOYER'S LIABILITY ACT HOW SHOULD STATE COURTS INTERPRET THE COMMON LAW?

The exact question presented appears not to have been decided by the Supreme Court of the United States. However, its opinion in the recent case of Central Vermont Ry. Company v. White,[1] read in connection with its previous opinions in cases under the Act, indicates strongly that its decision will be in favor of the construction by the Federal courts of the common law rules governing questions as applicable and binding in the trial of cases under the Act in the courts of the States. While the Act abrogates the fellow servant rule of the common law and abolishes entirely the common law defense of contributory negligence and assumed risk in certain cases and allows contributory negligence in mitigation of damages and assumed risk as a complete defense in others, it leaves the questions of negligence, contributory negligence and assumed risk to be determined in any given case by the rules of the common law. If there could be any doubt about this from the terms of the Act itself, such

(1) 238 U. S. 507.

doubt is removed by the Supreme Court of the United States in the case of Seaboard Air Line Railway Company v. Horton.[2] The Federal courts have never felt bound to follow the decision of State courts in the determination or application of common law principles in the trial of cases arising within the States, but have always exercised an independent judgment in such matters. This is very forcibly brought out in the opinion in the case of Baltimore & Ohio Railroad Company v. Baugh.[3]

We all know that there is no greater wilderness of conflicting and irreconcilable decisions of the courts than those construing and applying the principles of common law applicable to the liability of the employer for personal injuries to the employe. It is now settled that in suits under the Act brought in State courts, by the pleadings and requests for proper instructions to the jury, based on the evidence, negligence, contributory negligence, assumed risk, last clear chance or subsequent negligence, proximate cause, and related subjects can all be made Federal questions open to review by the Supreme Court of the United States.[4] It is unthinkable that the Supreme Court of the United States in such cases, with a long list of its own decisions construing the common law applicable, will abandon its own views and seek out those of the court of last resort of the State from which the case comes and by them determine whether the case should be affirmed or reversed. Such a course would only tend to confusion and render impossible the uniform operation of the Act throughout all the States, evidently one of the main purposes of Congress in its passage.

(2) 233 U. S. 492.

(3) 149 U. S. 368.

(4) Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668; Central Vermont R. Co. v. White, 238 U. S. 507; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492; St. Louis, etc., R. Co. v. McWhirter, 229 U. S. 265; St. Louis, etc., R. Co. v. Taylor, 210 U. S. 280, and authorities cited.

After all it is the intention of Congress in adopting the Act, as such intention may be gathered, of course, from the language used, which must control the answer to the question presented. In the Central of Vermont Railway case, the state courts of Vermont had refused, over the objection of the Railway Company, to apply to the case which was brought under the Act, the Vermont rule of general law, which placed upon the plaintiff the burden of acquitting himself of contributory negligence. In the course of the opinion affirming the correctness of this ruling the Supreme Court of the United States says: "The United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which held that the burden is on the plaintiff. (Citing a number of cases.) Congress, in passing the Federal Employer's Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line Railway Company v. Moore.[5] If this is a correct statement, and no one will question it, then Congress evidently intended that the Act should be construed in the light of the decisions of the Federal courts, construing and applying the common law applicable to the terms embraced in our question. In the Horton case brought under the Act in a State court of North Carolina the trial court framed his instructions to the jury on the State law governing the duty of the railway company in furnishing the plaintiff a safe and suitable appliance with which to work, and also on the State law governing assumed risk. On writ of error the Supreme Court of the United States held that the instructions on the duty of the railway company and also on the as-

(5) 228 U. S. 434.

sumed risk of the plaintiff should have been framed on the common law governing these subjects rather than upon the State laws. It is true that in that case the State laws held inapplicable were statutes which changed the rules of the common law as construed by the decisions of the Supreme Court of the United States, still it is not believed that the decision would have been different if the rules of the common law as construed by the Federal decisions had been changed by the judicial instead of legislative department of the State government.

The view here contended for is supported by a very strong opinion of Judge Trimble, of the Kansas City Court of Appeals, in the case of Cross v. Chicago, B. & Q. R. Company.[6] While bound to decide the case in accordance with the opposite view taken by the Supreme Court of Missouri in the case of Fish v. Railroad Company,[7] the opinion successfully combats that view and its reasoning seems to me to be unanswerable. The dissenting opinion of Judge Brown of the Supreme Court of North Carolina, in the case of Gray v. Southern Railway Company,[8] very forcefully supports the same view. The decision of the Supreme Court of Virginia, in the case of Southern Railway Company v. Jacobs,[9] and of the Texas Court of Appeals in the case of Freeman v. Powell,[10] are in line with the opinion of the United States Supreme Court in the Horton case and are also very persuasive of the correctness of the view here advanced. The Supreme Court of Missouri is supported by the Court of Appeals of Kentucky in at least three cases[11] and apparently by the majority of the Supreme Court of North Carolina in the Gray case, already cited, and also by the Springfield Court of Appeals in the case of Hawkins v. St. Louis & S. F. R. Company.[12]

The Supreme Court of Missouri in holding that the decision of the Supreme Court of the United States in the Horton case required the courts of the several States, in passing on the defense of assumed risk, to apply as a standard the common law rule on that subject, says: "This points a plain pathway—that of the common law as adopted, interpreted, expounded and enforced in the respective States." Under the common law as construed by the Courts of Missouri the servant does not assume the risk of any dangers created by the negligence of the master, while under the same law as construed by the Supreme Court of the United States in the Horton case, and authorities there cited, an entirely different rule applies. It would seem a sufficient answer to the view of the Missouri, Kentucky and North Carolina courts to point out that under that view, if the Fish case had reached the United States Supreme Court on writ of error that Court would have had to apply the Missouri rule of assumed risk, whereas if the suit had been brought in the Federal court, the Federal rule would have governed. Or, to put the matter another way under that view, the plaintiff's right to recover would be made to depend on the selection of the forum rather than on any principles of law of general application.

When we consider the medley of conflicting decisions, State statutes and constitutional provisions which existed and the condition sought to be remedied, it is obvious that Congress intended the operation of the Act to be uniform and indeed, this idea runs through the decisions construing it. It is equally obvious that this result cannot be obtained except by a uniform rule of decision covering every question of right which may be claimed

(6) 177 S. W. 1127.

(7) 172 S. W. 340.

(8) 83 S. E. 849.

(9) 83 S. E. 99.

(10) 144 S. W. 1033.

(11) Louisville & N. R. Co. v. Johnson, 171 S. W. 847; Helm v. C. N. O. & T. P. R. Co., 160 S. W. 945; C. N. O. & T. P. R. Co. v. Swan's Admrx., 169 S. W. 886.

(12) 174 S. W. 129.

under the Act, as distinguished from the remedy, and necessarily this rule must be the rule established by the Supreme Court of the United States, the court of last resort, whose decisions on questions arising under the Act are binding on all other courts both State and Federal. It is confidently believed that this is the view which will finally obtain.

J. T. STOKELY

Birmingham, Ala.

CARRIER—PASSENGER.

GEORGIA & F. RY. CO. v. TAPLEY.

Supreme Court of Georgia. Dec. 17, 1915.

87 S. E. 473.

(Syllabus by the Court.)

Where one goes to a flag station on the line of a railway company, at which passenger trains are accustomed to stop to take on passengers upon being signaled, and gives a proper signal to indicate his intention to get upon an approaching passenger train, he does not ipso facto become a passenger, and a charge to that effect was erroneous.

LUMPKIN, J. W. A. Tapley, by his next friend, brought suit against the Georgia & Florida Railway Company, to recover damages for a personal injury. A verdict was rendered in his favor for $500. The defendant moved for a new trial, which was overruled, and it excepted.

[1] 1. Taking the allegations of the petition together, there was nothing in the overruling of the demurrer which requires a reversal.

[2] 2. While the court might have stated to the jury somewhat more explicitly the contentions of the defendant, when the entire charge is considered it cannot be held that he entirely omitted to refer to the contention that the plaintiff was asleep beside the track; and he informed them that the plaintiff must recover under the allegations of his petition, or not at all.

[3] 3. The plaintiff contended that he went to a flag station on the line of the defendant railway company and gave a signal for a passenger train to stop, for that purpose stepping upon the track and using a lighted paper, it being dark; that the whistle was blown but the train did not stop, and while he was endeavoring to leave the track his foot was caught under the rail, and he was caused to fall in a position from which he could not entirely extricate himself before the train passed, and injured him; and that the catching of his foot was caused by the fact that the surface was not made level at that point where flagging was done and passengers boarded the train, and from the fact that the train did not stop, rendering it necessary for him to leave the track so as to endeavor to avoid injury. If the plaintiff had not become a passenger at the time of the injury, the measure of care due to him by the defendant was ordinary care. If he had become a passenger when the injury occurred, the measure of diligence due to him was extraordinary care. In the former event Civil Code 1910, § 2780, would be applicable. In the light of the pleadings and evidence, there was no error in giving it in charge. The suit was not entirely dependent upon the proposition that the plaintiff had become a passenger before he was injured, and it was not erroneous to give in charge the law as contained in that section, referring to injuries generally done to persons or property by the running of the locomotive or cars, or other machinery of a railroad company.

[4] 4. The court charged the jury that when a person presents himself at what is known as a "flag station," or a railroad station at which there is no ticket office, for the purpose of boarding a train which is running for the carriage of passengers, upon properly signaling an intention to get upon such passenger train, he would be considered as a passenger and would be entitled to the rights of a passenger. Later he made a more concrete application of the principle thus announced to the situation of the plaintiff, and instructed the jury that if the plaintiff presented himself at a point where the train was usually signaled, and did signal the passenger train and indicated that he desired to become a passenger, in contemplation of law he was thereafter to be treated as a passenger, and the railroad company would be bound to the use of extraordinary diligence in regard to him.

[5] Efforts to lay down a comprehensive definition of the word "passenger," or, in a single statement, to exhaust all possible circumstances under which the relation of carrier and passenger may exist, have not proved very successful. The varying facts under which

that relation may begin, continue, and terminate, render such a complete definition, applicable to all cases, difficult, if not impossible. It is easy to declare that where one has purchased a railroad ticket entitling him to transportation upon a train, and has at the proper time taken his seat in the proper car for that purpose, he is a passenger; but he may have entered the train without a ticket, yet with the means and intention to pay for transportation, or he may be in the act of boarding the train at a proper place for that purpose, and with a ticket or the necessary means of transportation, when injured; or he may have procured a ticket and be waiting in a waiting room set apart by the company for that purpose, while the train is being made ready for departure. These or other variations in circumstances may enter into the question of whether or not the relation has begun at a given time. One definition sometimes given is that a passenger is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare or which is accepted as equivalent therefor. As just indicated, however, this definition, like some others which have been made, does not comprehend all possible situations. Indeed, as a general rule, every person not an employe, being carried by the express or implied consent of the carrier upon a conveyance usually employed in the carriage of passengers, is presumed to be lawfully upon it as a passenger. After pointing out the difficulty of making an entirely comprehensive definition of the word, in 2 Hutchinson on Carriers (3d Ed.) § 997, it is said:

"There are two main elements in the legal definition of a passenger: First, an undertaking on the part of the person to travel in the conveyance provided by the carrier; and, second, an acceptance by the carrier of the person as a passenger. Whether either or both of these elements exist is ordinarily a question for the jury."

In section 1005 of the same work it is said:

"But a person may become a passenger, without having come into the carrier's vehicle, if the surrounding circumstances show an intent on his part to become a passenger and an acceptance of him by the carrier as a passenger."

In Moore on Carriers (2d Ed.) 972, the rule is thus stated:

"The relation of carrier and passenger is a contract relation, which commences when the passenger has put himself into the care of the carrier, or directly within its control, with a bona fide intention of being transported, and the carrier has expressly or impliedly received and accepted him as a passenger; and of necessity the existence of the relation is commonly to be implied from the attending circumstances. Where one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins."

Of course, the author also meant that this should be done at the proper time as well as at the proper place. Id., pages 954, 982; 1 Fetter, Carriers of Passengers, § 223; Dobie, Bailments and Carriers, 537 et seq. Central R. Co. v. Perry, 58 Ga. 461.

In Western & Atlantic R. Co. v. Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655, it was held that when a person goes to a railway station where there is no ticket office, but where it is customary for trains to stop when signaled in order to take on persons desiring to take passage, and by giving proper signals signifies his intention to become a passenger and the train is stopped for the purpose of taking him on, he is, when attempting to take the train, a passenger, and is entitled to all the rights of a passenger, although he has not purchased a ticket. A mere intention on the part of a person to become a passenger, without regard to any act on the part of the company, does not, *ipso facto*, constitute him such a passenger. Neither does the mere giving of a signal at a flag station make a person giving the signal a passenger on an approaching train.

The street railway and omnibus cases are not in all respects analogous to those involving an effort to take passage on a steam railway train at a flag station. One difference which will be readily perceived arises from the fact that street cars and omnibuses travel along highways which they do not own and over which other vehicles and pedestrians pass, while steam railways use a right of way along a fixed roadbed, and in many places have waiting rooms at fixed places for the reception of passengers. Also street cars and omnibuses usually stop either whenever signaled, or at certain short intervals upon signals, and passengers generally enter the conveyance in the public streets or at street crossings. Nevertheless the reasoning in cases involving the question of whether a person has become a passenger upon such a vehicle may be useful in considering the same question with reference to whether one has become a passenger on a steam railway train at a flag station. See, in this connection, 4 Ruling

Cases, 1003, § 471; Chicago Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341; Webster v. Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; Hogner v. Boston Elevated Ry. Co., 198 Mass. 260, 84 N. E. 464, 15 L. R. A. (N. S.) 960, and note; Bruff v. Ills. Cen. R. Co. (Ky.) 121 S. W. 475, 24 L. R. A. (N. S.) 740, and note. In Karr v. Milwaukee Heat, etc., Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. Rep. 1017, the Supreme Court of Wisconsin, in applying the rule of implied acceptance of a passenger, goes further than most other courts have gone. See note to that case in 13 L. R. A. (N. S.) 283, supra.

From the foregoing discussion, it is evident that the trial court erred in instructing the jury to the effect that one who goes to a flag station and signals a passenger train, thereby, without more, becomes a passenger.

Judgment reversed. All the Justices concur.

NOTE.—*Signalling from Flag Station on Railroad as Establishing Relation of Passenger.*—The instant case goes on the theory that acceptance or acts equivalent to acceptance, by the railroad defendant were necessary to create the relationship of passenger and carrier. In this case the train not stopping upon signal there was no proof of acceptance and, therefore, at most the plaintiff was a licensee on its track to whom a different measure of duty was owing.

The opinion appears to concede that as to omnibusses and street cars a mere signal from a place where they ought to stop on signal is sufficient, *prima facie*, at least, to establish the relationship of passenger and carrier. Impliedly it seems to be true, or, at least, there is much authority to this effect, that so far as railroads are concerned, presence at a regular station and preparation to board a train manifest the intention to become a passenger and *prima facie* the relationship of passenger and carrier arises.

All of this arises out of the duty of a carrier to accept whomsoever in good faith offers to become a passenger and does whatever is necessary to indicate to the carrier his intention to become a passenger. The distinction, therefore, becomes very narrow between signal to omnibusses and street cars and presence at regular railroad stations and flagging a train from a flag station on a railroad. The intending passenger places himself in position to flag an approaching train which the railroad has agreed will stop on being flagged. But it does not stop. The intending passenger takes position to flag in the place he is told to take, but, it being insecure, he suffers injury. If he cannot complete what he intended to do, is it not just as much the fault of the railroad that he is hurt as if an intending passenger had stepped in a broken place of a railroad platform at a regular station?

In Webster v. Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521, one was held not to have become a passenger, though having already purchased a ticket, where he was injured in running from a street and across premises outside of a station. But in discussion the court said: "A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition and in a proper manner at a proper place to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself, in readiness to be carried, under such circumstances, in reference to time, place, manner and condition that the railroad company *must be deemed to have accepted him as a passenger.*" (Italics are ours.) In this case the voluntary exposure to a danger, for whose existence the railroad was in no sense responsible, prevented presentation in a manner or at a place inducing the presumption of his acceptance as a passenger.

It is true that Karr v. Milwaukee, etc., Traction Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. Rep. 1017, was a street car case, where a car was signalled to stop and did not, but railroad and street car cases are cited as being on the same line in supporting authority.

Bruff v. Ill. C. R. Co., Ky., 121 S. W. 475, 24 L. R. A. (N. S.) 740, was a flag station case, in which the carrier was not held liable. This, however, was on the theory, that he was injured in consequence of failing to give a proper signal. The intending passenger lighted a newspaper on a dark night to signal the train, but it was too late for the train to slow up and too late for plaintiff to extricate himself from the dangerous place he was in. "Appellant having placed himself in a position of peril and having stayed there, from whatever cause, until it was too late to extricate himself, and not warning those in charge of the train in time to allow them an opportunity to stop or check the train to save him, his injury is the result of his own act, not their negligence." If he had warned the train in time, the inference is it should have stopped to take him on as a passenger.

In Murphy v. St. Louis I. M. & S. R. Co., 43 Mo. App. 342, there was a signal in time, as plaintiff testified. He was injured in attempting to board the train. The court said: "Whether the plaintiff at the time he received the injury was a passenger on defendant's train or occupied the position of a stranger cuts some figure in determining the sufficiency of the plaintiff's proof to establish a liability of the defendant. If plaintiff's evidence is to be credited, he occupied the relation of a passenger at the time he received the injuries." This case further said: "The invitation of the conductor to the plaintiff to get on and the attempt of the latter to do so, gave rise to an implied contract of carriage." Therefore, this case does not have any particular point in the question here considered.

The case of Western & A. R. Co. v. Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655, has the same fact in it as the Missouri case, viz.: direct invitation. It is not ruled, however, that the stopping of the train was a necessary ingredient of the passenger principle. The case was merely decided upon the facts in evidence.

A suburban electric railway may be thought more to resemble a railroad than it does a street railway and it has been held as to it that: "A person who stands upon the station platform of a suburban electric railway and signals an approaching car to stop in order that he may take

passage is in the railway's constructive care and sustains to it the relation of passenger." Great Falls, etc., Railroad Co., 40 App. D. C. 196. It was said that "the rule applicable to express trains that stop at scheduled points only has no relation to an electric railway that is supposed to stop at all stations if signalled." But would not the rule as to local trains stopping at flag stations apply? Signalling, however, from a place and stopping of trains on one or two other occasions is not sufficient to establish the fact, that it is the custom for a train to stop at a particular place, and, therefore, where there was testimony by defense that the place is not a stopping-place, even on signal, is admissible. Ga. Pac. Ry. Co. v. Robinson, 68 Miss. 643, 10 So. 60.

It seems too great a refinement to distinguish between street cars and railroads in such way as the instant case does. If there is a stopping-place for one, there is for the other, and if an intending passenger does all that is reasonably possible to indicate to the carrier, in the place it selects and in a proper manner, this should give him the status of a passenger. C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF THE MEETING OF THE KANSAS BAR ASSOCIATION.

The thirty-third annual meeting of the Bar Association of Kansas occurred January 27 and 28, 1916, in the Supreme Court rooms at Topeka.

This meeting was the best attended meeting in many years, more than two hundred lawyers being present.

Mr. Charles L. Kagey, of Beloit, the retiring president, made a sensational speech which, according to our information, was received with some amazement, especially his suggestion for abolishing the jury in civil cases. Mr. Kagey's address was entitled, "The High Cost of Justice," and several lawyers took issue with him on that proposition, Mr. Charles D. Shukers, in a subsequent address, contending that free justice was nothing more than Socialism. In reply to critics who contend that justice is not free, Mr. Shukers said it is evident that they look from the standpoint of such civil law business as may reach the courts. He denied the charge that lawyers, as a rule, charge large fees, and said that, generally speaking, few of them have any great income or any great wealth.

Mr. C. L. Hunt, of Concordia, gave an interesting address on the Bulk Sales Law, pointing out the fact that in some respects it had failed to protect creditors, as it was intended it should. He pleaded for the Uniform Bulk Sales Law as something to be desired.

The annual address was delivered by Mr. Edward J. White, of St. Louis, General Counsel for the Missouri Pacific Receivers. Mr. White's subject was "State and Federal Control of Carriers." The main point of his address was his contention that railroads cannot exist under the conflicting and unsatisfactory regulations of state and federal commissions; that the only hope for interstate railroads is to nationalize them and put them under federal control. Unless this is done government ownership is sure to follow.

"This deplorable condition of the interstate carriers in the United States," says Mr. White, "is due largely to the fact that they have had to meet, at one and the same time, not only two conflicting legislative theories, of unrelated and opposite character, of the state and federal government, but they have, at the same time, been bound and controlled by the inconsistent and conflicting laws, rules and orders of the various states through which the lines of railroad run, while primarily obligated to obey the lawful orders of the Interstate Commerce Commission."

A dramatic incident occurred in the course of the meeting when Al Williams of Columbus threw a bomb into the meeting by introducing, in the last hours of the convention, a resolution condemning the appointment of Louis Brandeis, of Boston, as Supreme Justice of the United States. The resolution was thrown out by a large majority on a standing vote.

The following officers were elected for the ensuing year: President, Charles Blood Smith, of Topeka; Vice-President, William Osmond, of Great Bend; Chairman of the Executive Council, William E. Higgins, of Lawrence; Secretary, D. A. Valentine, of Topeka; Treasurer, J. G. Slonecker, of Topeka. The Executive Council is composed of the following members: C. E. Corey, of Ft. Scott, A. L. Berger, of Kansas City, John C. Hogin, of Belleville, and Albert Watkins, of Dodge City.

BOOK REVIEWS.

ORTH'S READINGS ON THE RELATION OF GOVERNMENT TO PROPERTY AND INDUSTRY.

This volume is a compilation by Professor Samuel P. Orth, of Cornell University, of articles in law journals and other repositories "of much careful research and concise think-

ing" on the subject referred to in the title of the volume.

These treatises are put in logical order and are by able authors. Taken together they are a fair compendium of the views which are stirring the thought of the country in regard to a movement that is one of the most fateful in our history. The problems our swift advancing civilization is encountering regarding police power, property affected with a public interest, corporations and governmental regulations, is well discussed in the eclectic selection made. The volume should supply excellent reading not only for the practitioner, but for the student in the class room.

This book is bound in cloth, of good type and paper and comes from the Athenaeum Press, Ginn & Company, Proprietors, Boston, 1915.

VORHEES', THE LAW OF ARREST —SECOND EDITION.

A very handy and useful little book is this by Harvey Cortland Voorhees, of the Boston bar, the second edition of which comes after the first, which made its appearance in 1904.

The treatment of this subject is in simple style so that as an authority it will be consulted by the profession and at the same time be intelligible to those not versed in legal lore. The use of such a book by officers often is in emergent cases, both for their protection and for the securing of proper treatment of parties arrested. There is thus treated illegal arrests and seizures, illegality in the use of handcuffs, the confining of prisoners and generally their treatment.

Statutes may not contain all of the law on this subject and it is a distinct service to the public that officers should be securely guided in proceedings under writs or without writs in the making of arrests.

The volume is in octavo form, with flexible leather cover, well annotated, concise in its text and is published by Little, Brown & Co., Boston, 1915.

BOOKS RECEIVED.

Community Development. Making the Small Town a Better Place to Live In and a Better Place in Which to Do Business. By Frank Farrington, author of "Selling Suggestions," "Retail Advertising," "Store Management," "Making a Drug Store Pay," etc. Price, $1.50. New York. The Ronald Press Company. 1915. Review will follow.

HUMOR OF THE LAW.

A queer case occurred in the State of Louisiana. A man disappeared. He was thought to be dead, and his effects were distributed. He came back after 20 years and went into the court issuing the decree and asked an order to give him his property. The judge said: "In the eye of this court you are dead. This is not the place for you to get mistakes rectified. Get a lawyer and he will tell you what to do." The man persisted and said he "wanted his property and it was an outrage to deprive him of it another day." The judge said: "I tell you that in the eye of this court you are dead. Sheriff, take this application out of court."

"What is your idea of ease with dignity?"

"The attainment of a position," replied Senator Sorghum, "where people won't laugh if you talk about lecturing as if it were regular work."—Washington Star.

Champ Clark once told of a case brought up in Missouri in which one of the lawyers engaged tried to serve his client by throwing suspicion on a certain witness during the course of his cross-examination.

The first question put was:

"You admit that you were at the prisoner's home every evening during this period?"

"Yes, sir," replied the witness.

"State whether you and he were interested in any special transaction, such as, for instance, business or otherwise."

"Yes, sir, we were."

"Oh, ho!" exclaimed the wily attorney. "Then you will, no doubt, be good enough to inform us how and to what extent, also the nature of the business in which you were jointly interested."

"I haven't the least objection in the world," cheerfully answered the obliging witness. "If you want to know—I was courting his daughter!"

Rev. Dr. W. C. Bitting of Second Baptist Church enjoys court repartee. This is one of his favorites:

"You're charged with hitting this man. What is your plea?" a St. Louisan of great age was asked.

"But, judge, he called me a black fool."

"I wouldn't hit any man who called me a black fool."

"But what would you do to him if he called you the kind of a fool you is?"

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Abatement and Revival**—Judicial Discretion.—Where a plea in abatement was filed, before pleading to the merits, and the matter set up therein was not otherwise waived or abandoned, it was within the trial court's discretion to allow it to be filed after the time for filing had passed.—Huntsville Grocery Co. v. Johnson, Ala. App., 69, So. 967.

2. **Acknowledgment** — Certification.—Before an officer is authorized to certify the acknowledgment of a purported deed, there must be in fact an acknowledgment by the grantor of the instrument signed.—Sulzby v. Palmer, Ala., 70 So. 1.

3. **Action**—Tort.—Where a broker undertook to buy stocks for a customer on margin and afterwards reported that he had bought some stock and that it was held for and on the customer's account, his subsequent sale of it without notice was a tort.—Katz v. Mathews, N. Y., 110 N. E. 425.

4.——Waiver.—Broker's tort in sale of customer's margin stock without notice might, at the customer's election, be waived, and the broker held liable as upon as contract.—Katz v. Mathews, N. Y., 110 N. E. 425.

5. **Adverse Possession**—Dower.—A deed in legal form purporting to convey lands in fee simple, in which the grantor had only a dower interest, constitutes color of title, and furnishes a basis for adverse possession.—Graves v. Causey, N. C., 86 S. E. 1030.

6. **Alterations of Instruments**—Materiality.—An alteration, whereby the word "President" was added to the name of the payee without consent of the maker, is a material one avoiding it.—Citizens' State Bank of Ramona v. Grant, Okl., 152, Pac. 1082.

7. **Arbitration and Award**—Arbitrators.—Under an agreement for an arbitration and award, the arbitrators derive their powers entirely from the submission, and cannot include anything in the award not within the terms and scope of the submission.—Wise v. Johnson, Ala. App., 69 So. 986.

8. **Arson**—Threats.—Threats by the defendant or ill will exhibited by him against the owner or occupant of the burned house are admissible in evidence to show motive for the crime of arson.—Cunningham v. State, Ala. App. 69, So. 982.

9. **Assistance, Writ of**—Issuance of. A writ of assistance will not be issued against strangers to the judgment unless they are trespassers or intruders, or acquired possession pendente lite, nor can it be substituted for an action of ejectment.—Cooper v. Cloud, Ala., 69 So. 928.

10. **Attachment**—Lien.—The lien of an attachment does not exceed the actual interest of the debtor in the property at the time of the levy, and does not displace prior equities or rights.—Wilson v. Kruse, Ill., 110 N. E. 359.

11. **Attorney and Client**—Stipulations.—An attorney has no power without special authorization to enter into a stipulation for the disposition of his client's property.—Woerner v. Woerner, Cal., 152 Pac. 919.

12. **Bankruptcy**—Preference.—An ordinary suit by a trustee under Bankr. Act, § 60b, as amended by Act June 25, 1910, to recover a voidable preference, is not cognizable in equity, but one under section 67e, as amended by Act Feb. 5, 1903, to recover property fraudulently transferred, is within the equity jurisdiction.—Simpson v. Western Hardware & Metal Co., U. S. D. C., 227 Fed. 304.

13.——Receiver.—Record of a state court showing the appointment of a receiver for a corporation held insufficient to show that the appointment was made because of insolvency, which constituted an act of bankruptcy within the Bankruptcy Act.—In re Butte Duluth Mining Co., U. S. D. C., 227 Fed. 334.

14. **Banks and Banking**—Business of.—Church, whose treasurer, its priest, borrowed small sums of his parishioners, giving the church's notes therefor, which bore interest, both for the church's convenience and that of the parishioners, held not engaged in banking.—Martin v. St. Aloysius Church, R. I., 95 Atl. 768.

15. **Bills and Notes**—Burden of Proof.—The indorsee of a negotiable note, who in his suit against the maker seeks protection as a bona fide purchaser against secret defense, must plead his character as such, so that the complaint must show the instrument as negotiable.—Weinstein Bros. v. Citizens' Bank, Ala. App., 69 So. 972.

16.——Foreign Corporation.—Under Negotiable Instruments Law, § 60, innocent holder of note held entitled to recover thereon, though payee was foreign corporation which had not complied with the law as to filing a copy of its charter.—Edwards v. Hambly Fruit Products Co., Tenn., 180 S. W. 163.

17.——Presentment and Demand.—Presentment and demand at the bank at which a note is payable is necessary to charge an indorser, except where the maker has no funds at the bank to meet it.—Myers Co. v. Battle, N. C., 86 S. E. 1034.

18. **Building and Loan Associations.**—Foreclosure of Mortgage.—Mortgage given by stranger to a third person and purchased by a building and loan association, authorized only to lend to its stockholders, cannot be foreclosed by the association or by its assignor as trustee for it.—North Ave. Building & Loan Ass'n v. Huber, Ill., 110 N. E. 312.

19. **Carriers of Passengers**—Respondent Superior.—Where plaintiff, a passenger, delivered his ticket to the conductor on the sleeping car, and the conductor failed to return it to him, but gave it to some other passenger, the defendant was responsible for the conductor's act.—Louisville & N. R. Co. v. Laney, Ala. App., 69 So. 993.

20.——Sale of Ticket.—Where a ticket agent fails to deliver passengers the tickets called and paid for, the carrier is liable for damages resulting therefrom.—Gerety v. New York & N. J. R. Co., N. J. Sup., 95 Atl. 733.

21. **Champerty and Maintenance**—Public Policy.—Generally a contract between an attorney and a layman by which the latter agrees to solicit business for the former in considera-

tion of a share of the fees is void, as against public policy.—Chreste v. Louisville Ry. Co., Ky., 180 S. W. 49.

22. **Chattel Mortgages**—Conversion.—Where the proceeds of that part of cotton which defendant directed the grower to sell and bring to him went in satisfaction of a landlord's lien superior to plaintiff's mortgage, defendant is not liable for a conversion.—Dixie Fertilizer Co. v. Teasley, Ala. App., 69 So. 988.

23.——Priority.—A purchase-money mortgage given simultaneously with moving goods upon premises held to be a lien prior to landlord's lien for rent.—Ancient Order of United Workmen v. Martin, Iowa, 154 N. W. 913.

24. **Commerce**—Employe.—Railroad employe who had directed other employes in unloading barrels of paint from a car in the yard and was fatally injured by a barrel sliding from skid and striking him after he had turned away and was talking about another part of his duty, held engaged in superintendence of the work so far as that was interstate commerce.—Salmon v. Southern Ry. Co., Tenn., 180 S. W. 165.

25.——Employes.—Employes engaged in transporting a new outhouse to a depot used for interstate traffic, to install same in place of an old one previously erected, held within the protection of the Federal Employers' Liability Act.—Nash v. Minneapolis & St. L. R. Co., Minn., 154 N. W. 957.

26.——Employes.—Federal Employers' Liability Act does not prevent recovery under Workmen's Compensation Act of 1911 for death of railroad employe in New Jersey while engaged in interstate commerce.—West Jersey Trust Co. v. Philadelphia & R. Ry. Co., N. J. Sup., 95 Atl. 753.

27.——Employes.—One who shovelled coal into containers carrying it to bins whence part of it was used to coal interstate commerce locomotives, held not engaged in interstate commerce.—Zavitowsky v. Chicago, M. & St. P. Ry. Co., Wis., 154 N. W. 974.

28.——Federal Employers' Liability Act.—Where an employe was killed by negligence of an interstate carrier, his recovery cannot be limited by the state Workmen's Compensation Act, for the Federal Employers' Liability act of 1908 superseded all state laws on the subject.—Grybowski v. Erie R. Co., N. J. Sup., 95 Atl. 764.

29.——Foreign Corporation.—The provisions of the state statutes and Constitution, regulating foreign corporations doing business in the state, relate only to intrastate business, as if extended to interstate business, they would violate the commerce clause of the federal Constitution.—Fifth Ave. Library Society v. Rhodes, Ala., 69 So. 918.

30. **Constitutional Law**—Amendment.—An amendment of a state Constitution which diminishes rather than increases the police powers of the Legislature cannot be said to be contrary to any of the provisions of the federal Constitution.—Hockett v. State Liquor Licensing Board, Ohio, 110 N. E. 485.

31.——Due Process of Law.—Where the Constitution expressly grants to a city the right to construct and operate a public utility in another city, its impairment of the value of the property of a private corporation operating similar plant was not a taking of its property without due process.—City and County of San Francisco v. McGovern, Cal. App., 152 Pac. 980.

32.——14th Amendment.—Laws Or. 1915, c. 228, imposing an excise tax of 5 per cent on the gross receipts of users and furnishers of trading stamps, held to violate the equality clause of the fourteenth amendment to the federal Constitution.—Cottrell v. Sperry & Hutchinson Co., U. S. D. C., 227 Fed. 256.

33. **Corporations**—Lawful Combination.—It is legitimate for the owners of a majority of the stock of a corporation to combine for the purpose of controlling it.—Luthy v. Ream, Ill., 110 N. E. 373.

34.——Delegable Powers.—Directors cannot delegate the powers vested in them to act for the corporation to any officer or men, even though they are the majority stockholders.—Ames v. Goldfield Merger Mines Co., U. S. D. C., 227 Fed. 292.

35.——Stockholders.—A stockholder, though it is expressly agreed it shall be irrevocable, may withdraw from a combination to control the majority of the stock of the corporation.—Luthy v. Ream, Ill., 110 N. E. 373.

36. **Courts**—Comity.—"Comity" is a doctrine founded in necessity, meaning the rule under which one authority gives way to another, and has no application where what is done by one court is with concurrence of the other. It answers with courts and cabinets, in law and diplomacy, substantially the same purpose which personal courtesies serve in the social relations. One principle is that the court which first asserts jurisdiction may continue its assertion without interference from the other.—United States v. Marrin, U. S. D. C., 227 Fed. 314.

37. **Damages**—Liquidated.—A stipulation in a contract fixing the same sum as liquidated damages for breach of several undertakings of different importance will be treated as penalty.—Elzey v. City of Winterset, Iowa, 154 N. W. 901.

38.——Measure of.—Under Rev. Laws 1910 § 2872, a passenger suing for personal injuries is entitled to show the profits of his business which depended on his personal exertions, for the purpose of assessment of his damages, though the business required the investment of a small capital.—Muskogee Electric Traction Co. v. Eaton, Okl., 152 Pac. 1109.

39. **Dedication**—Plats.—While a person who sold lots and blocks in a subdivision on a plat containing streets and alleys is estopped to deny the existence of the streets, an adverse claimant of the entire tract is under no such disability.—Shedd v. Alexander, Ill., 110 N. E. 327.

40.——Revocation.—Where the owner of land filed a map evincing an intention to dedicate land as a highway, his successor in title could revoke such offer by filing another map showing a contrary intention before acceptance by the public.—Eltinge v. Santos, Cal., 152 Pac. 915.

41. **Deeds**—Construction.—Deed, whereby grantee was to build a one-story structure and the grantor was to build a hotel above it, held valid, since the grantor had the right to divide his holdings by lateral lines.—Pearson v. Matheson, S. C., 86 S. E. 1063.

42. **Easements**—Prescription.—A telegraph company, which built its line over the right of way of a railroad company under a parol license, by maintaining the same for more than 20 years under claim of right, held to have acquired a prescriptive right.—Western Union Telegraph Co. v. Georgia R. & Banking Co., U. S. D. C., 227 Fed. 276.

43.——Quality of Interest.—An easement, such as for construction and maintenance of a telegraph line on a railroad right of way, as distinguished from a pure or technical easement, is an interest in land, which confers upon its owner some right, benefit, dominion, or lawful use out of or over the estate of another, and is a species of incorporeal hereditament.—Western Union Telegraph Co. v. Georgia R. & Banking Co., U. S. D. C., 227 Fed. 276.

44. **Embezzlement**—Estoppel.—Where G., under the name of K., made an agency contract with a corporation, and pursuant thereto sold the corporation's stock and failed to account for the money received, held that, in a prosecution for embezzlement, he was estopped to deny his agency on the ground that K. was not his correct name.—State v. Gross, Ohio, 110 N. E. 466.

45. **Eminent Domain**—Special Benefits.—The term "special benefits" implies benefits such as are conferred specially on private property, as distinguished from such benefits, termed "general benefits," as the general public is entitled to receive therefrom.—Stocker v. Nemaha Valley Drainage Dist. No. 2, Nemaha County, Neb., 154 N. W. 862.

46.——Water Company.—A water company invested with the power of eminent domain can appropriate the waters of a stream outside the limits of the district for which it was incorporated, if the purpose be to supply the public in the territory where under its charter it has the right to transact its corporate business.—Rider v. York Haven Water & Power Co., Pa., 95 Atl. 803.

47. **Estoppel**—Partition.—Estate sought to be partitioned or sold held conclusively presumed an estate in fee simple, where complainant derived his interest under a warranty deed from respondent purporting to convey a fee simple.—Harper v. Martin, Ala., 69 So. 930.

48. **Evidence**—Burden of Proof.—Where there was nothing in or on notes sued on indicating that the defendant, who had written his name across the back, intended to be charged other than as indorser, he might show that it was an accommodation indorsement, or the relation of the indorsers as between themselves.—Myers Co. v. Battle, N. C., 86 S. E. 1034.

49. **Executors and Administrators**—Evidence.—Where, in an action for services performed by plaintiff as a member of another's family, plaintiff relies on an express contract made with a living person, defendant in the suit and competent to testify, plaintiff need prove the contract only by a preponderance of the evidence.—Merrick v. Ditzler, Ohio, 110 N. E. 493.

50.——Services.—Where, in an action for services rendered by plaintiff as a member of the family of a deceased person, defense is made by personal representatives of the deceased, plaintiff must by clear and convincing proof show an express contract to pay for such services.—Merrick v. Ditzler, Ohio, 110 N. E. 493.

51. **Fraud**—Fraudulent Representation.—In an action for fraudulent representations in the sale of defendant's business as to the amount of business done per day, that the plaintiffs did not do as much business in the store as the defendant claimed to have done was not evidence of fraud.—Anastas v. Koliopoulos, Mass., 110 N. E. 292.

52. **Frauds, Statute of**—Stipulation by Attorney.—An attorney in a divorce suit without written authority to stipulate for the conveyance of his client's land cannot bind his client by a stipulation not signed by the client, contemplating a conveyance of land by his client to the adverse party.—Woerner v. Woerner, Cal., 152 Pac. 919.

53. **Fraudulent Conveyances**—Consideration.—Payments to the wife of the seller of a stock of goods are an insufficient consideration to protect the buyer as a purchaser in good faith against the creditors of the seller, in the absence of any proof that the seller was left solvent after the transaction.—Keet-Rountree Dry Goods Co. v. Hodges, Mo. App., 180 S. W. 24.

54.——Parties.—Creditors of an old firm, who were not creditors of a new firm formed after sale by a retiring partner in violation of Bulk Sales Act, § 1, cannot question the validity of a chattle mortgage given by the new firm on the ground that it was in violation of the act.—Markarian v. Whitmarsh, N. H., 95 Atl. 788.

55. **Gifts**—Delivery.—Where a prospective husband sought to make a parol gift of corporate stock to his bride, which was never consummated by delivery of the stock, the gift was inoperative.—Cannon v. Birmingham Trust & Savings Co., Ala., 69 So. 934.

56. **Homestead**—Collateral Attack.—A decree allotting homestead to a widow cannot be collaterally impeached, on issues of whether the property was actually the homestead or whether decedent in fact owned other property, and, where no fraud in procurement of the decree is charged or proved, the decree is final.—Miller v. First Nat. Bank of Birmingham, Ala., 69 So. 916.

57. **Homicide**—Duty of Retreat.—Rule that person assailed need not retreat from his dwelling house, though extending to person's place of business, held not to extend to an illicit distillery maintained at a place other than the person's dwelling house. Hill v. State, Ala., 69 So. 941.

58.——Evidence.—There was no error in allowing the state to prove that a pistol was found in the woods near the scene of the shooting, or in allowing a witness to describe it, and to testify that one chamber was empty.—Burton v. State, Ala., 69 So. 913.

59.——Self-Defense.—To justify self-defense, the circumstances must be such as to induce reasonable belief, and must actually induce belief, that there is imminent peril and that retreat cannot be resorted to without increasing the peril.—Hill v. State, Ala., 69 So. 941.

60. **Husband and Wife**—Gift.—Where land purchased with community funds is conveyed to the wife, the presumption arises that the husband intended a gift of the land to her as her separate property.—Hitchcock v. Rooney, Cal., 152 Pac. 913.

61. **Infants**—Next Friend.—Where a bill was brought for a minor by his next friend, and, on the complainant's majority the agency of the next friend automatically ceased, there was no change of parties, for a "next friend" is not regarded as a party for any purpose.—Slafter v. Savage, Vt., 95 Atl. 790.

62. **Innkeepers**—Boarding House.—A private housekeeper entertaining a boarder in a single instance held not keeping of a "boarding house," within Revisal 1908, § 3434a, as to obtaining entertainment with intent to defraud.—State v. McRae, N. C., 86 S. E. 1039.

63.——Intent to Defraud.—Failure to pay is not sufficient evidence of intent to defraud within Revisal 1908, § 3434a, making it an offense to obtain entertainment at an inn or boarding house without paying therefor with intent to defraud.—State v. McRae, N. C., 86 S. E. 1039.

64. **Insurance**—Accident.—Where insured suffered from dilation of the heart following the voluntary taking of a cold bath, held, that the injury was not the result of an accident within a policy indemnifying him against injuries effected solely by accidental means.—New Amsterdam Casualty Co. v. Johnson, Ohio, 110 N. E. 475.

65.——Sole Ownership.—Where plaintiff, in an action on a fire policy, was equitably entitled to immediate and absolute legal ownership, he was vested with "unconditional and sole" ownership within the policy.—Exchange Underwriters' Agency of Royal Exchange Assur. of London, England, v. Bates, Ala., 69 So. 956.

66. **Intoxicating Liquors**—Seizure.—Seizure by sheriff under writ of law and equity court of a county of whisky in transit to another county in such other county held illegal.—Brown & Hagin Co. v. McCullough, Ala., 69 So. 924.

67. **Jury**—Books and Papers.—Affidavits of jurors that they took with them to their jury rdom a bank book, a part of which had been introduced in evidence, and that they considered the entire book, could not be considered in support of motion for new trial.—Carter State Bank v. Ross, Okl., 152 Pac. 1113.

68.——Quashing Panel.—That some of the panel were ineligible or incompetent to serve as jurors was no ground for quashing the regular and agreed panel of 75 jurors, as such objection goes to the individual juror, and not to the whole panel.—Burton v. State, Ala., 69 So. 913.

69. **Landlord and Tenant**—Invitee.—A landlord held responsible for injuries to an 18 months old child falling through a hole in a porch railing from failure to repair, irrespective of actual knowledge of conditions.—Miller v. Geeser, Mo. App., 180 S. W. 3.

70.——Surrender.—Where a tenant wrongfully abandons the premises, the landlord, at his election, may enter and terminate the contract and recover rent to time of abandonment, or may leave the premises vacant and sue for the entire rent, or may if possible, give notice of refusal to accept a surrender and sublet for the tenant's benefit.—Conner v. Warner, Okl., 152 Pac. 1116.

71. **Licenses**—Exemption.—Defendant raising chickens by incubator and selling them is not liable for license tax to a town whose charter exempts one who sells articles "produced" on his farm.—Bacon v. Cannady, Ga., 86 S. E. 1083.

72.——Jitney Busses.—A city ordinance licensing jitney busses and regulating the tax according to the seating capacity was not invalid as failing to comply with the charter provision that all licenses should be graduated according to the amount of business done.—Ex parte Counts, Nev., 153 Pac. 93.

73. **Limitation of Actions**—Account Stated.—An account stated and mutually accepted by the parties gives rise to a new cause of action, and, though it does not create a written contract, limitations on the action do not begin to run until the time when the account was stated.—Cowell v. Snyder, Cal., 152 Pac. 920.

74. **Malicious Prosecution**—Advice of Attorney.—That defendant had made to prosecuting attorney a full and true statement of all facts concerning the crime within his knowledge, and acted upon advice that a prosecution be instituted, constituted a good defense.—Hightower v. Union Savings & Trust Co., Wash., 152 Pac. 1015.

75.——Probable Cause.—The want of probable cause cannot be inferred from the existence of malice, but must be expressly shown.—Hightower v. Union Savings & Trust Co., Wash., 152 Pac. 1015.

76. **Mandamus**—Reclamation District.—Under Pol. Code, § 3466, as amended by St. 1911, p. 645, mandamus would issue to force reclamation trustees to call in enough of an assessment to meet warrants held by contractors with whom the trustees had agreed to pay such warrants within two years, though the contractors knew at the time that an election would determine the question of paying for the work by sale of a bond issue.—Moreing v. Shields, Cal. App., 152 Pac. 964.

77. **Master and Servant**—Assumption of Risk.—Risk from violent, unusual, and unnecessary contact of a motor with a flat car propelled thereby is not one assumed by employes on the car.—Nebo Coal Co. v. Barnett, Ky., 180 S. W. 79.

78.——Assumption of Risk.—A servant cannot be held to have assumed the risk attendant upon a key and set screw projecting from revolving shaft, where, when the shaft was revolving the screw and key were not visible and the servant had had no opportunity to observe the shaft when not in motion.—Olson v. Seldovia Salmon Co., Wash., 152 Pac. 1033.

79.——Delegable Duty.—Negligence in the maintenance of the safety of roof in a mine, being a delegable duty, creates liability on the part of master for injury, where the duty was delegated.—Standard Steel Co. v. Clifton, Ala., 69 So. 937.

80.——Employment.—Where an employe continues after expiration of his contract for employment to render the same services as before, the master is liable for the services, and, in the absence of other evidence, the price named in the written contract is the measure of recovery.—Curtis v. Dodd & Struthers, Iowa, 154 N. W. 872.

81.——Federal Employers' Liability Act.—To authorize recovery under the federal Employers' Liability Act, defendant must be a common carrier by railroad engaged in interstate commerce; plaintiff must be employed by it in such commerce; and the injury must result from the carrier's negligence while he was so employed.—Lewis v. Denver & R. G. R. Co., Minn., 154 N. W. 945.

82.——Warning.—The master is not free from negligence in ordering a servant, without warning of the danger, to paint the inside of a battery well, because ignorant of the danger from its fumes, where by use of ordinary care it would have discovered it.—Schaffner v. C. F. Massey Co., Ill., 110 N. E. 381.

83.——Workmen's Compensation Act.—Workmen's Compensation Act of 1911 permits a recovery for death of an employe in New Jersey, though contract of employment was made elsewhere.—West Jersey Trust Co. v. Philadelphia & R. Ry. Co., N. J. Sup., 95 Atl. 753.

84. **Mines and Minerals**—Invitee.—Where a mineowner invites another to work in the mine, he is liable for injuries received by such person only if such person was authorized to occupy the place where injured, and the danger was such that the defendant could have foreseen the accident.—Patterson v. Alabama Fuel & Iron Co., Ala., 69 So. 952.

85. **Municipal Corporations**—Barriers Against Danger.—The object of a barrier is to give warning of danger, but where the condition of the street, such as a building being moved and standing in the street upon cribbing four or five feet high, is itself a danger signal, the necessity of a barrier is removed.—Lombardi v. Bates & Rogers Const. Co., Wash., 152 Pac. 1025.

86.——Grade.—Where a grade was established when only a portion of a street was excavated, the city, upon the excavation of the remainder of the street, is bound to maintain it at the original grade fixed.—Hollenbeck v. City of Seattle, Wash., 153 Pac. 18.

87.——Negligence.—The unexplained presence of defendant's unattended horse, harnessed to a wagon, running away and on the sidewalk, breaking through plaintiff's show window, held to create a presumption of negligence of defendant.—Tietje & Christ v. Catalona, N. J. Sup., 95 Atl. 733.

88.——Pedestrians.—While the law does not say how often a pedestrian must look, nor how far, nor when nor from where, if he looks as he starts to cross, and the way seems clear, he is not bound as a matter of law to look again.—Knapp v. Barrett, N. Y., 110 N. E. 428.

89.——Public Health.—An action for damages for negligence in the construction and maintenance of a drain by the city cannot be defeated on the ground that it was for the benefit of the public health.—City of Montgomeyr v. Stephens, Ala. App., 69 So. 970.

90.——Repair Work.—Work of improving park boulevard was not repair work, because park commissioners proposed to use base of old pavement as base of new, but was such a first improvement as the commissioners were authorized to make by special assessment, under Act June 16, 1871 (Laws 1871-72, p. 579) and Act June 21, 1895 (Laws 1895, p. 290).—South Park Com'rs v. Wood, Ill., 110 N. E. 349.

91.——Special Benefits.—Special benefits from a street improvement cannot be assessed in gross on several tracts to their single owner, but, where several lots are owned and improved as one, special benefits from a street improvement may be assessed on them to their single owner in gross.—Village of Des Plaines v. Winkelman, Ill., 110 N. E. 417.

92. **Nuisance**—Cemetery.—A cemetery is not a nuisance per se and cannot be enjoined because offensive to the esthetic sense of an adjacent proprietor.—Sutton v. Findlay Cemetery Ass'n, Ill., 110 N. E. 315.

93.——Injunction.—Ink factory emitting noxious and unwholesome fumes destructive to health, and rendering living in the vicinity unbearable in respect to physical comfort, will be enjoined as a nuisance.—Harrigan v. Sinclair & Valentine Co., N. J. Ch., 95 Atl. 738.

94. **Partnership**—Action.—Where one suing a partnership desires to subject individual as well as firm property, the suit should be against the partners by name described as partners under the firm name or against the firm by name described as a partnership composed of the partners, and such partners by name.—Weinstein Bros. v. Citizens' Bank, Ala. App., 69 So. 972.

95. **Payment**—Application.—A debtor is bound by the application of a payment to unsecured instead of secured claims, although contrary to his directions when the payment was made, where on notice he assented to the application as made.—The Quickstep, U. S. D. C., 227 Fed. 255.

96.——Application.—In the absence of an agreement providing otherwise, payment upon a debt consisting of principal and interest, not actually applied by the debtor or creditor is first applicable to the interest due and then to the principal.—Shepard v. City of New York, N. Y., 110 N. E. 435.

97.——Mistake.—Payments made under a mistake of fact cannot be recovered back if the person paying has contributed to the mistake by his own negligence.—Rosenfeld v. Boston Mut. Life Ins. Co., Mass., 110 N. E. 304.

98. **Physicians and Surgeons**—Evidence.—Where defendant, a surgeon, removed plaintiff's adenoids successfully, but in doing so cut her tongue, such fact, together with other facts having a tendency to show negligence, took the question of his negligence to the jury.—Evans v. Roberts, Iowa, 154 N. W. 923.

99. **Principal and Surety**—Diligence.—Sureties, guaranteeing performance of contract, held bound to inquire and ascertain whether the obligations arising under the contract had been discharged by their principal.—Averyt Drug Co. v. Ely-Robertson-Barlow Drug Co., Ala., 69 So. 931.

100. **Principal and Agent**—Power of Attorney.—Though power to execute a sealed instrument must be under seal, an injunction bond procured by an attorney of record with knowledge of his principal, and purporting to be signed by the principal through the agent, under which an injunction is obtained, is binding on the principal, regardless of the attorney's authority.—Harris v. Woodard, Ga., 86 S. E. 1097.

101. **Railroads** — Acquiescence. — Where a footpath across and along a railroad track has been habitually used by the public for many years, it is a question of fact whether the railroad company has not acquiesced in such use. —Wilhelm v. Missouri, O. & G. Ry. Co., Okl., 152 Pac. 1088.

102.——Negligence.—A person who attempts to pass between coupled freight cars obstructing a street crossing and attached to a locomotive is guilty of negligence barring his right to recover for resulting injuries, unless the trainmen knew of his presence.—Reno v. Yazoo & M. V. R. Co., La., 70 So. 43.

103.——Trespasser on Tracks.—Where a deaf trespasser walking on the track fails to use his sense of sight and is struck by a train, the company is not liable unless the engineer carelessly ran him down.—Hooker v. Wabash R. Co., Neb., 154 N. W. 855.

104.——Willful Negligence.—The death of plaintiff's son from an explosion of the fire box while he was riding on defendant's engine as trespasser would not entitle plaintiffs to recover, in the absence of "willful negligence." —Spencer v. Chicago, M. & St. P. Ry. Co., Wis., 154 N. W. 979.

105. **Receivers**—Ministerial Duty.—A receiver being a ministerial officer, his sale of mortgage personalty must be confirmed by the court in order to be valid.—Northern Brewery Co. v. Princess Hotel, Or., 153 Pac. 37.

106. **Sales**—Proposal and Acceptance.—Delivery of an order to a salesman of plaintiff's selling agent, which was by him transmitted by mail to plaintiff, held not to constitute an acceptance by the plaintiff thereof so as to form a contract of sale.—Moneyweight Scale Co. v. Gordon Mercantile Co., S. C., 86 S. E. 1060.

107.——Repudiation of Contract.—Where a buyer of goods in course of manufacture for him repudiates the contract, the seller need not complete the manufacture, but may sue at once.—Crandall Pettee Co. v. Jebeles & Colias Confectionery Co., Ala., 69 So. 964.

108.——Separable Contract.—Where defendant bought a quantity of bricks to be delivered in installments, the contract was entire, and subsidiary stipulations as to partial delivery and payment did not divide the contract.—Seibert v. Dunn, N. Y., 110 N. E. 447.

109. **Schools and School Districts**—Negligence.—The question of negligence of a school district in leaving accessible to small pupils a horizontal ladder seven feet above the concrete floor, unprotected by mats, held, under the evidence, for the jury.—Howard v. Tacoma School Dist. No. 10, Pierce County, Wash., 152 Pac. 1004.

110. **Street Railroads**—Last Clear Chance.—If a motorman, after discovering perilous condition of a truck, did not have his car under control, or was negligent in not stopping it, contributory negligence held not to excuse railway company.—Hutchinson Purity Ice Cream Co. v. Des Moines City Ry. Co., Iowa, 154 N. W. 890.

111.——Transfers.—Condition of ordinance of city of Chicago prohibiting street railway from accepting transfers from without city, thus abrogating previous contract between the railway and a village for a five-cent fare to a point within Chicago, held valid.—People v. Chicago Rys. Co., Ill., 110 N. E. 394.

112. **Taxation**—Tangible Property.—No state has power to tax tangible property located beyond its jurisdiction, no matter under what guise it may undertake to do it.—Commonwealth v. Westinghouse Air Brake Co., Pa., 95 Atl. 807.

113. **Telegraphs and Telephones**—Corporation.—That a telephone association is about to erect poles and wires under license from a village does not fix its character as a public corporation.—State Public Utilities Commission v. Bethany Mut. Telephone Ass'n, Ill., 110 N. E. 334.

114.——Non-Delivery of Telegram.—Where plaintiff, sick and contemplating return home, wired his son to meet him on train 44, and failed to take it, the telegraph company was not liable for non-delivery of the message, unless the son, had he received it, would have met the train plaintiff actually took.—Western Union Tel. Co. v. Kyle, Ark., 180 S. W. 208.

115.——Public Utilities Commission.—The Public Utilities Commission has no jurisdiction over private telephone company because of diversion of streets and alleys from legitimate used by erection of poles and wires.—State Public Utilities Commission v. Bethany Mut. Telephone Ass'n, Ill., 110 N. E. 334.

116. **Trade-Marks and Trade-Names**—Unfair Competition.—Courts do not decide misleading markings on manufactured goods, the patent on which has expired, by the caveat emptor rule of buyer and seller, but on the theory that a buyer who has become accustomed to a particular article is entitled to be unmistakably informed that a person other than the former maker is manufacturing the same; the rights of the rival makers not being the only thing to be considered.—Jenkins Bros. v. Kelly & Jones Co., U. S. C. C. A., 227 Fed. 211.

117. **Vendor and Purchaser**—Condition Precedent.—Demand for performance by the vendor of a contract to sell real estate is not a prerequisite to recover for breach of contract, where it is not within the power of the vendor to comply therewith.—Young v. Brady, Pa., 95 Atl. 802.

118.——Constructive Notice.—Actual possession of land under an unrecorded deed is constructive notice of the legal and equitable rights of the possessor, and his possession by a tenant is the same in all respects as his own possession.—Wilson v. Kruse, Ill., 110 N. E. 359.

119.——Notice from Possession.—The rule that open, notorious possession of realty under an apparent claim of ownership is notice of the possessor's claim, does not apply to a vendor remaining in possession so as to require a purchaser from his grantee to inquire whether he had any interest in the land conveyed, provided the purchaser is an innocent purchaser free from any fraud on the vendor. —Hass v. Gregg, Okl., 152 Pac. 1126.

120.——Prior Deed.—In the absence of notice, a purchaser for value, who has acquired the legal title by conveyance recorded or lodged for record, has a claim superior to that of a purchaser under a prior deed, never recorded, and claimed to be lost.—Salyer v. Elkhorn Land & & Improvement Co., Ky., 180 S. W. 38.